No. 10925

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

F. C. MOSER, *Appellant,*

vs.

NEW YORK LIFE INSURANCE COMPANY, *a corporation,*

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

APPELLANT'S OPENING BRIEF

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CLERK

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AT
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UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

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JURISDICTION

This is an appeal from an order and judgment of dismissal of the District Court of the United States for the Western District of Washington, Northern Division, in a law action No. 901 entitled "F. C. Moser, plaintiff vs. New York Life Insurance Company, a corporation, defendant" which order and judgment of dismissal dismissed plaintiff's action with prejudice to any subsequent suit or action upon said claim, with costs to the appellee. (Tr. 8)

The appellant, F. C. Moser, commenced this action

in the Superior Court of the State of Washington for King County against the appellee, New York Life Insurance Company, a corporation. Within the time required by law appellee filed a petition for removal of the action to the United States District Court for the Western District of Washington, Northern Division. (Tr. 2) Appellee further filed its Removal Bond in the said Superior Court. (Tr. 8) By order dated March 6, 1944, the judge of said Superior Court entered an order accepting the petition and bond and directing the removal of the cause to the United States District Court for the Western District of Washington, Northern Division, the basis of said removal being diversity of citizenship and the amount involved exceeding $3,-000.00. (Tr. 10)

The appellee thereafter filed its appearance. (Tr. 13), and its bond of non-resident defendant on removal (Tr. 14) with the clerk of the United States District Court.

Appellee then served and filed motion to dismiss appellant's complaint on the ground that (1) plaintiff failed to allege facts sufficient to state such a claim, and (2) it appears affirmatively from the allegations thereof that the action alleged, if any is barred by the statute of limitations of the State of Washington, and by laches on part of plaintiff. (Tr. 16), together with a motion for more definite statements or for a bill of

particulars. (Tr. 17) On July 3, 1944, the court entered an order granting appellee's motion for a bill of particulars. (Tr. 29) Appellant thereafter served and filed a bill of particulars. (Tr. 33).

After a hearing was had the judge of the District Court entered an order dismissing appellant's action on September 11, 1944. (Tr. 80-81).

On October 10, 1944, appellant filed with the clerk of the District Court notice of appeal to the Circuit Court of Appeals and cost bond on appeal pursuant to the provisions of Rule 73 (C) of Federal Rules of Civil Procedure (Tr. 8-82). On October 24, 1944, appellant filed a Designation and Content of record on Appeal with the clerk of the district court (Tr. 83).

This court has jurisdiction of this case by reason of Section 28 of the Judicial Code and Section 71, Title 28, U. S. C. A.

STATEMENT OF THE CASE

Appellant, F. C. Moser, commenced this action to recover damages from the appellee, New York Life Insurance Company, a corporation, arising from the alleged fraudulent and false representations claimed to have been made by appellee to appellant. The trial court sustained appellee's motion to dismiss on the ground that appellant's action was barred by the Statute of Limitations and laches. From the order and judgment of dismissal with prejudice, this appeal is taken.

Appellant's complaint herein was augmented by a bill of particulars. The salient allegations of the complaint are Tr. 23-27):

II

> That the defendant is a foreign corporation and at all times herein mentioned has been and now is doing business in the State of Washington under and pursuant to the applicable laws of the State of Washington permitting foreign corporations to do business in this state; that said defendant at all of said times has and does now maintain an office in Seattle, King County, Washington, for the transaction of company business.

III

> That at all times from October 7, 1907, to and including August 22, 1936, the plaintiff was a special agent of the defendant corporation for the purpose of canvassing for applications for life insurance and annuities and performing such other duties as might be required of him by the terms of his contract of employment with the defendant corporation consisting of agency agreements and Nylic. (26)

IV

That on or about January 1, 1908, plaintiff entered into a contract with the defendant wherein the plaintiff was to employ his full time as a soliciting life insurance agent for the defendant, which agreement provided for compensation to the plaintiff of nine (9) renewals of five (5) per cent each, or a total renewal commission of forty-five (45%) per cent.

V

That some time in the year 1910 the defendant established for its life insurance soliciting agents a "dual agency system" consisting of "Nylic" and a single agency agreement; that "Nylic" is a system which embraces two periods, the first period of twenty (20) years designated by the defendant as the "Qualifying Nylic Period" and the lifetime period thereafter designated by the defendant as the "Senior Nylic Period."

VI

That during the year 1910 while the plaintiff was working for the defendant under said agreement dated January 1, 1908, the defendant in order to have the plaintiff surrender his said agreement dated January 1, 1908, and to permit the defendant to substitute therefor an agreement under the defendant's said Dual Agency System represented to the plaintiff that the plaintiff's compensation under said Dual Agency System during plaintiff's qualifying Nylic period which the parties agreed to be for seventeen (17) years expiring January 1, 1928, would be the equal of the 45% in renewals provided for in the said agreement dated January 1, 1908.

VII

That plaintiff relying upon said representations (27) entered into a contract with defendant

under the said Dual Agency and "Nylic" system and surrendered the contract dated January 1, 1908, and in lieu thereof defendant gave plaintiff an agency agreement dated August 17, 1910, and a "Nylic" contract, both to become simultaneously effective on January 1, 1911.

VIII

That at all times during said plaintiff's said qualifying "Nylic" period of 17 years between January 1, 1911, and January 1, 1928, the plaintiff performed services under said contract relying upon the said defendant's representations as to the amount of compensation to be paid plaintiff by the defendant thereunder.

IX

That said representations were false and fraudulent in that the plaintiff actually received during said period from the defendant under said Dual Agency System, $52,171.45 in renewal commissions and $56,498.95 in "Nylic" payments, or a total Dual Agency payment of $108,709.82, whereas during this same period plaintiff would have been entitled to receive the sum of $156,514.35 in renewal commissions under the single agency agreement dated January 1, 1908, and that by reason of the premises defendant has wrongfully defrauded plaintiff out of the sum of $47,804.53, which sum is now due and owing.

X

That the defendant at all times made all the calculatitons, handled all of the funds and made all the payments on compensation that was due based on its own calculations; that the plaintiff reposed great confidence in the defendant and its methods of business and that a fiduciary relationship existed between the parties and that as a result of plaintiff's trust as to the manner of the operations of the defen-(28) dant plaintiff did not

> discover that said representations as to the amount of his compensation were falsely and fraudulently made to him and that the plaintiff did not discover that such representations were false and fraudulent until within a period of at least a year from the date hereof.

The Bill of Particulars disclosed the following additional facts which appellant believes to be pertinent to a consideration of this appeal.

Concerning the nature of the representations, the Bill of Particulars alleged that (Tr. 35):

> (f). The specific promise and representations were that if plaintiff would surrender to defendant plaintiff's agency agreement dated January 1, 1908, plaintiff's Exhibit "A" and permit defendant to substitute for same defendant's Dual Agency System comprising an agency agreement, plaintiff's Exhibit "C" and "Nylic", plaintiff's Exhibit "B", that the compensation of plaintiff under said Dual Agency System during the qualifying Nylic period of said Nylic System which it was agreed would be for 17 years from January 1, 1911, to January 1, 1928, would equal or exceed compensation which plaintiff would make during said 17 years under plaintiff's agency agreement, Exhibit "A". Plaintiff's Agency Agreement, exhibit "A" provided for nine renewals of 5% each and one extra fifth year renewal of 5%.

and further that the Nylic payments in the sum of $56,498.95 were received by appellant prior to January 1, 1928, and that of the item of $52,171.54, the sum of $49,298.66 was received prior to January 1,

1928, and the balance of $2,892.88 from January 1, 1928, until December 29, 1929 (Tr. 36).

The original agreement dated January 1, 1908, between appellant and appellee (Tr. 37-46) provided in part that (Tr. 41):

> "13th. It is agreed that the first party's ledger account with said second party shall at all times be competent and conclusive evidence of the state of the account between the parties hereto, and shall constitute a mutual estoppel as between them. In consideration of the last above agreement in this paragraph contained, the first party agrees to furnish to the second party a copy of his said ledger account, not oftener, however, than once a month upon receipt of written request therefor, due allowance to be made, however, for clerical delays in furnishing the same, and if one copy of his ledger account has been furnished him, any subsequent copy may consist only of the additional ledger entries made since the date of the last copy of additional ledger entries furnished him."

This same clause is in the agreement dated August 17, 1910, (Tr. 69) which was substituted for the agreement dated January 1, 1908, in paragraph 13 thereof as follows (Tr. 73):

> "13th. It is agreed that the first party's ledger account with said second party shall at all times be competent and conclusive evidence of the state of the account between the parties hereto, and shall constitute a mutual estoppel as between them."

This agreement also provided (Tr. 75):

> "19th. It is expressly understood and agreed

> that this agreement shall be considered strictly confidential, and that under no circumstances shall said second party mention or exhibit the terms thereof to any person or persons."

In connection with and as a part of the "Dual Agency" system of which the above contract was one part, and "Nylic" (Tr. 47) the other part. Nylic consisted of a twenty year qualifying period and after the successful completion of this period, the agent became a Senior Nylic. To become a member of Nylic, the agent must agree as follows (Tr. 53):

> "Any agent of the New York Life Insurance Company, in good and regular standing, shall, upon making written application on the Company's authorized form, and upon agreeing, so long as he remains a member of Nylic, to devote all his time, talents and energies to the company's service in soliciting personally for business, and also upon receiving a certificate of membership executed by the Company, becomes a Freshman Nylic as of January 1, preceding the date of his contract, or on any January 1 thereafter, as he may elect, if he complies with all of the conditions laid down herein."

Appellant fulfilled the requirements of Nylic and became a Senior Nylic.

To the complaint as supplemented by the foregoing Bill of Particulars, appellee filed a motion to dismiss based on the grounds that (1) plaintiff fails to allege facts sufficient to state such a claim, and (2) it appears affirmatively from the allegations thereof that

the action alleged, if any is barred by the statute of limitations of the State of Washington, and by laches on part of plaintiff.

This Motion was sustained by the Trial Court and an order entered dismissing the action with prejudice (Tr. 80).

SPECIFICATIONS OF ERROR

I. The Court erred in sustaining appelle's Motion to Dismiss Appellant's Complaint.

II. The Court erred in entering an order dismissing Appellant's action with prejudice.

III. The Court erred in holding Appellant's action barred by the Statute of Limitations.

SUMMARY

Since this matter arises from the action of the trial court in sustaining appellee's motion to dismiss to appellant's complaint, the only factual question presented on this appeal is whether the complaint is barred by the Statute of Limitations or by laches, the complaint alleging that appellant, now a Senior Nylic and a life insurance agent until 1936 of appellee life insurance company seeks recovery of damages sustained by him when appellee falsely and fraudulently induced appellant to surrender an existing agency contract for another contract providing for a different and complicated method of compensation to appellant by falsely representing that the amount to be received under the new and complicated method would exceed the former compensation; it further appearing that appellee kept all the books and records and that a fiduciary relationship existed between the parties and that appellant had the greatest trust and confidence

in appellee and only discovered the fraud within a year before the action was commenced; it further appeared that the last payment was received by appellant in 1930.

The motion to dismiss, being in effect a demurrer, admits the truth of the facts alleged.

> *Soule v. Seattle*, 6 Wash. 315, 33 Pac. 1080.
> *McMillan v. Sims*, 129 Wash. 516, 225 Pac. 240.

The relevant statute of limitations of the State of Washington governing this action is Remington's Revised Statutes, Sec. 159, subdivision 4, which provides as follows:

Within three years:

* * * * * * * * * *

> (4) "An action for relief upon the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud."

This motion to dismiss admits that a fiduciary and confidential relation existed between appellant and appellee. As long as such relation exists, appellee was duty bound to disclose all the facts to the appellant.

> *Thomas v. Whitney*, 186 Ill. 225, 57 N. E. 808, 810.

> "Fiduciary or confidential relation, as used in the law relative to undue influence is a very broad term. It has been said that it exists and relief is granted in all cases in which influence has been

acquired and abused, in which confidence has been reposed and betrayed. The origin of the confidence and the source of the influence are immaterial. The rule embraces both technical fiduciary relations and those informal relations which exist whenever one man trusts in and relies on another."

See also:

Koehler v. Haller, 112 N. E. 527 (Ind.)

Miller v. Henderson, 33 Pac. (2d) 1098, 1102 (Kans.)

Patton v. Shelton, 40 S. W. (2d) 706, 712 (Mo.)

Beach v. Wilton, 91 N. E. 492 (Ill.)

Meyer v. Campion, 120 Wash. 457; 207 Pac. 670.

Under the Washington decisions, as long as fiduciary or confidential relations exist, appellant was not required to question the accounts, which were kept by the appellee under the contract, and were of a highly complicated nature as demonstrated by the contracts, Exhibits "B" (Tr. 47 at page 57 et seq) and "C" (Tr. 6 2at page 75 et seq) of appellant's Bill of Particulars.

Cole v. Utley, 188 Wash. 667, 63 P. (2d) 473.

Larson v. McMillan, 99 Wash. 626, 170 Pac.324.

ARGUMENT

Under the well settled rule that upon the hearing of a demurrer or motion to dismiss, interposed by a defendant, the plaintiff is entitled to every reasonable inference to be derived from the complaint decided in his favor, the motion to dismiss must be overruled if it appears from the facts pleaded that appellant under the Washington Statute quoted above did not discover the facts constituting the fraud until within one year prior to commencing this action.

To justify his failure to discover the appellee's fraud, appellant alleged that appellee under the contract kept all the books and accounts and also that a fiduciary and confidential relation existed between the parties. This is the allegation of ultimate facts to be proved by appellant. If appellee had so elected it could have attacked the allegation by a motion to make more definite and certain or for a bill of particulars, but appellee elected not to do so. As aginst a motion to dismiss the allegations stand admitted. Appellant at all times continued to be a Senior Nylic of appellee and continued to draw Senior Nylic compensation and this relationship existed when this action was commenced, appellant only ceasing to be an active life insurance agent in August, 1936.

The terms "fiduciary or confidential relations" embraces in law any number of situations as the decisions well illustrate.

In addition to Thomas v. Whitney, cited above, see the following:

> *Miller v. Henderson*, 33 Pac. (2d) 1098, 1102 (Kans.)
>
> "Fiduciary relation does not depend on technical relation created by or defined in law, but exists in cases where special confidence has been reposed in one who, in equity is bound to act in good faith and with due regard to interests of one reposing confidence."
>
> *Patton v. Shelton*, 40 S. W. (2d) 706, 712, (Mo.)
>
> "Fiduciary relation not only includes all legal relations, such as attorney and client, broker and principal, executor or administrator and heir, legatee or devisee, factor and principal, guardian and ward, husband and wife, partners, *principal and agent*, trustee and cestui que trust, but it extends to every possible case in which a fiduciary relation *exists in fact* and in which there is confidence reposed on one side and resulting domination and influence on the other." (Italics ours).

The provisions of Nylic No. 2 and the Agency Agreements reveal the unfair domination the defendant at all times retained over the plaintiff, and was at all times in a position to exercise.

The terms of "Nylic" are such that the Nylic Agent must at all times impose the utmost confidence in the defendant, with the appellee completely dominating the Nylic Agent. After the Nylic Agent spends twenty years in successfully qualifying as a Senior Nylic, and then does not retire under Senior Nylic Rules and de-

cides to continue for life in the service of the appellee (which was the primary objective of Nylic) the Senior Nylic imposes still greater confidence in the appellee than he did when he was a Qualifying Nylic Agent. Thus the Senior Nylic period accentuates the "Fiduciary Relationship" between the appellee and its Senior Nylic Agents.

In *Cole v. Utley*, 188 Wash. 667, 63 P. (2d) 473, plaintiff sued the defendant, her brother, to recover the sum of $1,000.00 alleged to have been fraudulently withheld by defendant from plaintiff thirty years before when defendant sold a tract of timber belonging to his sister as his sister's agent. The existence of confidential and fiduciary relations was alleged. Plaintiff discovered the fraud a short time before commencing the action. The Court allowed the issue of confidential relationship and as to whether the plaintiff should have discovered the fraud to go to the jury.

In *Larson v. McMillan*, 99 Wash. 626, 170 Pac. 324, the plaintiff sued the defendant in an action for deceit and the principal question was whether the action is barred by the statute of limitations. The basis of the action was that the defendant had represented that he was unmarried when he married the plaintiff, although he was in fact then married. The court held the action did not accrue until investigation by the plaintiff disclosed his former marriage although some

time before she had discovered a letter telling of his family and other wife where the defendant denied any other marriage and the confidential and fiduciary relation continued until shortly before the action was commenced. In so holding the court said:

> "There is as much, and more modern, authority to the effect that one who has been defrauded may bring an action after the fraud is discovered. To this latter theory the legislature has given its sanction. Rem. Code., Sec. 159, Subd. 4.
>
> "We may grant that respondent had a cause of action when the marriage ceremony was performed, and that she had a cause of action at the time she discovered the letter from appellant's son, but she was not bound to bring a suit unless she knew, or should have known, of the fraud. The law binds a party to the exercise of no more than "ordinary care" and "reasonable diligence," and the wrongdoer cannot set up a lack of care or diligence when, by his concealments, he has lulled his victim to sleep upon his rights. The law intends that no one shall profit by his own fraud, or that the statute shall be seized upon as a means whereby a fraud is made successful and secure."

The question involved on this appeal is presented purely from the adjective standpoint, that is to say, does the complaint state sufficient facts that the motion to dismiss should be overruled? Appellant submits that there is no fact stated in the complaint which would require appellant to investigate appellee's representations or which would put appellant on notice of appellee's alleged fraud since the motion to dismiss admits the existence of fiduciary and confidential re-

lations until the time of discovery of the fraud within one year of the commencement of the action. Many decisions will undoubtedly be cited by appellee but the court will note that in each of these decisions there is some fact appearing either on the face of the complaint or in the pleadings which ordinary prudence would require the plaintiff to investigate. The absence of any such fact on the face of the complaint taken together with the existence of confidential and fiduciary relation we submit require the overruling of the motion to dismiss in the case at bar.

WHEREFORE appellant respectfully submits that the order and judgment of dismissal of the trial court should be reversed with instructions to the district court to overrule the motion to dismiss and require the appellee to answer appellant's complaint.

Respectfully submitted,

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